No. 75-985

In the Supreme Court of the United States

OCTOBER TERM, 1975

AMERICAN THEATRE CORPORATION, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners claim (1) that a court of appeals is required independently to view allegedly obscene materials in order to determine whether they are obscene; (2) that the materials here are not obscene; and (3) that the evidence is insufficient to show petitioners' knowledge of the contents of the materials. Petitioner American Theatre also claims that 28 U.S.C. 1918(b), which provides for the imposition of costs upon a convicted defendant, is unconstitutional.

After a jury trial in the United States District Court for the District of Nebraska, petitioners were convicted of taking obscene films from a common carrier, in violation of 18 U.S.C. 1462.[1] Petitioner Berry was sentenced to

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[1]Petitioners were charged and convicted on two counts, each charging the receipt of one film. The two counts were consolidated for sentencing.

five years' imprisonment, to be served on weekends for the first six months. The remainder of the sentence was suspended. Petitioner American Theatre was fined $5,000 and assessed $809.32 in costs, pursuant to 28 U.S.C. 1918 (b). The court of appeals affirmed (Pet. App. A; 526 F.2d 49). A suggestion of rehearing *en banc* was rejected, with three judges dissenting (Pet. App. B; 526 F.2d at 51-53).

The evidence showed that on December 7, 1973, two films entitled "Champagne Party" and "(X) The Club (X)" were delivered to petitioner Berry at the Pussycat Theater in Omaha, Nebraska (Tr. 9, 16-17). The films had been shipped from Atlanta, Georgia (Tr. 13). Petitioner Berry was the manager of the Pussycat Theater, which was incorporated as petitioner American Theatre Corporation (Tr. 27, 44, 52-53, 63).

Petitioners' counsel on appeal agreed that the films (Pet. App. A. 3; footnote omitted)—

> depicted adult men and women participating in various sex acts including sexual intercourse with penetration, fellatio, cunnilingus, and masturbation. These acts were committed heterosexually and homosexually between couples and in groups. On several occasions, semen was ejaculated and then spread on the women's [*sic*] body.

The film "Champagne Party" was shown at the Pussycat Theater on December 12, 1973 (Tr. 46-47).

Dr. J. Whitney Kelley, an expert witness, testified that the films appeal to the prurient interest, are patently offensive, and have no serious scientific value (Tr. 109-121).

Dr. Beverley Mead and Dr. Duane Spiers testified on petitioners' behalf. Dr. Mead expressed a qualified opinion that the films do not appeal to the prurient interest and that they have some educational value (Tr. 170-172,

179). Dr. Spiers testified that the films do not appeal to the prurient interest and that they have therapeutic and possibly educational value (Tr. 251-252, 254-256).

1. Relying on the description of the films by petitioners' counsel and on the expert testimony, the court of appeals held that it was permissible for the jury to convict petitioners (Pet. App. A. 3). It did not view the films (Pet. App. A. 3, n. 2). Petitioners urge (Pet. 5-11) that appellate courts must view the materials in all obscenity cases. This issue presently is before the Court in *Marks* v. *United States,* No. 75-708, certiorari granted, March 1, 1976.[2] We therefore believe that the Court should defer disposition of this petition until it has rendered a decision in *Marks.*

2. None of the other issues presented in the petition requires review by this Court. Petitioners contend (Pet. 11-13) that, because allegedly comparable materials have been found to be protected by the First Amendment, the films in question are not obscene. But, as this Court noted in *Hamling* v. *United States,* 418 U.S. 87, 126-127, "[a] judicial determination that particular matters are not obscene does not necessarily make them relevant to the determination of obscenity of other materials." The films here, which include explicit depictions of no fewer than 47 sexual acts, fall squarely within the categories of obscene materials discussed in *Miller* v. *California,* 413 U.S. 15, 25. Petitioners were engaged in the "public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain" that this Court found punishable in *Miller, supra,* 413 U.S. at 35. Petitioners' claim that the films constitute protected speech is groundless.

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[2]Petitioners' counsel also are counsel in *Marks* and therefore have received a copy of our response in that case.

3. Petitioners contend (Pet. 18-23) that the evidence was insufficient to show that they "had knowledge of the contents of the materials * * *, and that [they] knew the character and nature of the materials." *Hamling* v. *United States, supra,* 418 U.S. at 123. This argument was correctly rejected by the court of appeals, which observed (Pet. App. A. 5):

> The following evidence was presented at trial from which the jury could find that Berry had knowledge of the contents, nature and character of these films: (1) Berry was listed as the registered agent of American Theater Corporation in its Nebraska Articles of Incorporation [Tr. 52-53, Exh. 8]; (2) Berry was in fact, if not in name, the manager of the Pussycat Theater, where these films were consigned and where "Champagne Party" was shown [Tr. 27, 44, 63]; (3) the Pussycat Theater showed exclusively "X" rated movies to "adults only" patrons [Tr. 43, 64]; (4) Berry ordered the films for the theater and instructed the projectionist which films to show [Tr. 43-44, 62]; and (5) films from the same distributor had been sent to Berry at the Pussycat Theater for several years in containers similar to the one in which "Champagne Party" and "(X) The Club (X)" were received [Tr. 2-3, 13, 60].

Petitioners' claim requires only the application of settled principles to the facts of this case, and further review is unnecessary.

4. Petitioner American Theatre challenges (Pet. 13-17) the constitutionality of 28 U.S.C. 1918(b), which provides that "[w]henever any conviction for any offense not capital is obtained in a district court, the court may order that the defendant pay the costs of prosecution."[3] Petitioner American Theatre was assessed $809.32 under

[3]Assessable costs are enumerated in 28 U.S.C. 1920.

that statute.[4] The corporation claims that the statute constitutes an unconstitutional burden on the right to a jury trial because the complexity of a jury trial increases the potentially assessable costs. This is the first challenge to the constitutionality of Section 1918(b); accordingly, there is no conflict among the circuits and no occasion for review by this Court.

Petitioner was convicted after a jury trial. Any effect of Section 1918(b) did not cause petitioner to forego a jury trial. Petitioner therefore has not established the foundation for the constitutional challenge it seeks to raise.[5]

Moreover, petitioner's claim is essentially the same as that rejected (with respect to the right to counsel) in *Fuller* v. *Oregon,* 417 U.S. 40. In *Fuller* this Court upheld an Oregon recoupment statute which provides that under certain circumstances a convicted defendant who was indigent at the time of trial may be required to pay for costs of legal representation.[6] The defendant in *Fuller* claimed, *inter alia,* that the statute was invalid because "a defendant's knowledge that he may remain under an obligation to repay the expenses incurred in providing him legal representation might impel him to

[4]The costs assessed include fees of the marshal, fees for witnesses and docketing fees. Petitioner did not appear at the hearing before the district court clerk concerning the amount of costs to be taxed, nor did petitioner appeal the clerk's decision to the district court as permitted by Fed. R. Civ. P. 54(d) (see Pet. App. A. 6, n. 5).

[5]In *United States* v. *Jackson,* 390 U.S. 570, upon which American Theatre relies, not only was the burden upon selecting a jury trial great (potential exposure to the death penalty) but also the defendant claimed that as a result of the burden he would not exercise his right to a jury trial.

[6]Petitioner is not indigent, and no claim here relates to the application of Section 1918(b) to an indigent defendant.

decline the services of an appointed attorney and thus 'chill' his constitutional right to counsel" (417 U.S. at 51). The statute in *Fuller* also would have deterred defendants from exercising their right to a jury trial, for the costs of representation in such a case would be greater.

The Court upheld the Oregon legislation, reasoning that it "is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship" (417 U.S. at 54). The statute here places no greater burden upon a defendant's constitutional rights than did the state statute in *Fuller*. Section 1918(b) is "[u]nlike the statutes found invalid * * *, where the provisions 'had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them,' *United States* v. *Jackson, supra,* at 581." *Fuller* v. *Oregon, supra,* 417 U.S. at 54. Section 1918(b) simply allows the district court to impose upon a convicted defendant an obligation to repay governmental expenditures resulting from a defendant's wrongdoing. Here, as in *Fuller,* the statute is valid.[7]

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[7]Petitioner American Theatre also asserts that Section 1918(b) is invalid because it provides a "penalty" in addition to that provided in the criminal statute under which it was convicted, and which may cause the total penalty to exceed the statutory maximum. To the extent that this is an argument that imposition of costs is an invalid exercise of judicial or prosecutorial discretion, the answer is that the legislature itself has provided for the imposition of costs. In any event, the recovery allowed by Section 1918(b) is civil in nature (*Oates* v. *United States,* 233 Fed. 201, 207 (C.A. 4), certiorari denied, 242 U.S. 633), and therefore is not an excessive criminal penalty.

It is therefore respectfully submitted that the petition for a writ of certiorari should be held pending this Court's decision in *Marks, supra,* and then disposed of in light of that decision.

ROBERT H. BORK,
Solicitor General.

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